

STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

In the matter of:)	Docket Number: PAT-FY08/09-01
)	
BAKERSFIELD TRANSFER, INC.)	ORDER DENYING PETITION FOR
1620 Brundage Lane)	REVIEW OF PERMIT DECISION
Bakersfield, California 93307)	
)	California Code of Regulations,
EPA ID. NO. CAD 000 282 598)	Title 22, Section 66271.18
)	
)	Effective Date: October 22, 2008
)	
)	

I. INTRODUCTION

On March 7, 2008, the Department of Toxic Substances Control's Permit Renewal Team (PRT) issued a Standardized Hazardous Waste Facility Permit, Series B (Permit), decision for the Bakersfield Transfer, Inc., (herein referred to as "BTI") hazardous waste storage and transfer facility located at 1620 Brundage Lane, Bakersfield, California (Facility). On April 7, 2008, Ms. Jodi Smith for Paul Hastings Janofsky & Walker, LLP, filed a petition for review (appeal) of the BTI Permit decision on behalf of Demenno/Kerdoon (Petitioner).

This Order denies Petitioner's request to review a provision within the Permit's "Special Conditions" (Part V.H.), which requires the permittee to test used oil received by the Facility for polychlorinated biphenyls (PCBs).

II. JURISDICTION

The Department has jurisdiction over hazardous waste facility permits and the imposition of conditions on such permits pursuant to the California Health and Safety Code sections 25200 et seq., 25186.1(b)(1) and California Code of Regulations, title 22, sections 66270.30, 66271.18.

III. BACKGROUND

A. DESCRIPTION OF PROPOSED FACILITY

The proposed BTI Facility will be located on a triangular-shaped piece of land zoned M2 for medium industrial use. The Kern County Assessor's Parcel Number is 019-260-01. The Facility will accept, consolidate, store and transfer used oil, oily water, oily solids, contaminated petroleum sludge, and waste antifreeze. Wastes will be received in drums, roll off bins, cubic yard boxes, totes, super sacks, tanker trucks, and vacuum trucks. Upon arrival at the Facility, the incoming waste will go through fingerprint analysis. Representative samples will be collected from each incoming shipment. After analysis for constituents other than PCBs confirms that the shipment of waste is acceptable, the waste will be unloaded into permitted storage or treatment units and may be commingled with other shipments.

The proposed units at this Facility will include: a tank farm (Unit #1), which will support four 20,000-gallon aboveground tanks; a drum storage area (Unit #2); a roll-off bin storage area (Unit #3); a drum loading/ unloading area (Unit #4); and, a tanker loading/unloading area (Unit #5). For Unit #1, Tanks 1 and 2 will be for storage of used oil and Tanks 3 and 4 will be for storage of waste antifreeze and oily water, respectively. After consolidation and gravity separation, the wastes in the storage tanks will be shipped to another facility for recycling, treatment or disposal. Permit Condition V.H. requires, inter alia, that the Facility test the commingled used oil for PCBs or arrange for such testing to be performed by the receiving facility.

B. PERMIT DECISION

In 2006, the Facility applied for a Series B Standardized Permit. The PRT prepared a Draft Permit and a Draft Negative Declaration in compliance with the California Environmental Quality Act (CEQA, Public Resources Code section 21000 et seq.) for the project. On December 3, 2007, the PRT issued a public

1 notice announcing the start of a 45-day public comment period for both the Draft
2 Permit and Proposed Negative Declaration. A public hearing was held at the
3 Kern County Library on January 8, 2008. The PRT did not receive oral
4 comments at the public hearing. The public comment period ended on
5 January 16, 2008. The PRT received two comments via e-mail from
6 Mr. Ben McNeil and three comment letters from Mr. Kevin Boles,
7 Mr. Michael Freund, and Demenno/Kerdoon.

8 On March 7, 2008, the PRT issued the final Series B, Standardized
9 Hazardous Waste Facility Permit decision for the BTI Facility along with a
10 Response to Comments document that included responses to comments that
11 were received during the public comment period. The final permit decision
12 corrected two typographical errors regarding the correct maximum capacity and
13 containment volume for one of the five permitted units (Unit 5). The draft
14 Negative Declaration was finalized without any modifications.

15 **C. PERMIT APPEAL PROCESS**

16 Pursuant to California Code of Regulations, title 22, section 66271.18(a),
17 the period for filing a petition for review (appeal) of this final Permit decision
18 ended on April 7, 2008. One petition for review was received on April 7, 2008
19 from Ms. Jodi Smith of Paul, Hastings, Janofsky & Walker, LLP, on behalf of
20 Petitioner. On April 14, 2008, the Department issued a letter to Mr. Ben McNeil
21 of BTI stating that pursuant to California Code of Regulations, title 22, sections
22 66271.14(b)(2), the entire Permit was stayed until the Department completed its
23 review of the appeal. The Department's review is to determine which, if any, of
24 the issues raised in the appeal meet the criteria for review pursuant to California
25 Code of Regulations, title 22, section 66271.18.

26 **IV. STANDARD OF REVIEW**

27 California Code of Regulations, title 22, section 66271.18(a), provides that
28 those persons who filed comments, or participated in the public hearing, on a

1 draft permit decision (during the public comment period for the draft permit
2 decision) may petition the Department to review any condition of the final permit
3 decision to the extent that the issues raised in the petition for review were also
4 raised during the public comment period for the draft permit decision, including
5 the public hearing. In addition, any person who did not file comments or
6 participate in the public hearing on the draft permit may petition the Department
7 for review of the final permit decision, but only with respect to those changes in
8 the final permit decision from the draft permit decision.

9 Section 66271.18(a) also provides, in pertinent part, that:

10 The petition shall include a statement of the reasons supporting
11 that review, including a demonstration that any issues being raised
12 were raised during the public comment period (including any public
13 hearing) to the extent required by these regulations and when
appropriate, a showing that the condition in question is based on:

- 14 (1) a finding of fact or conclusion of law which is clearly erroneous,
or
15 (2) an exercise of discretion or an important policy consideration
16 which the Department should, in its discretion, review.

17 California Code of Regulations, title 22, section 66271.12, specifies the
18 extent to which issues are required to be raised during the public comment
19 period for a draft permit decision. Specifically, this section states that:

20 All persons, including applicants, who believe any condition of a
21 draft permit is inappropriate or that the Department's tentative
22 decision to deny an application or prepare a draft permit is
23 inappropriate, must raise all reasonably ascertainable issues and
submit all reasonably available arguments and factual grounds
supporting their position.

24 Because Petitioner submitted comments on the draft permit decision
25 during the public comment period, Petitioner has standing to petition for review of
26 any issues raised during the public comment period for the draft permit decision,
27 as well as any issues that pertain to changes from the draft to the final permit
28 decision.

V. DISCUSSION AND FINDINGS

The Department has reviewed the Petitioner's appeal and hereby responds to the arguments presented by Petitioner to support its Appeal Comment. For the reasons discussed below, the Department finds that Petitioner has failed to demonstrate that the Permit condition in question is based on a finding of fact or conclusion of law that is clearly erroneous or an exercise of discretion or an important policy consideration that the Department should, in its discretion, review. The Petitioner's Appeal Comment and the Department's response are set forth below.

Appeal Comment: Petitioner challenges the inclusion of the PCB testing requirements for used oil within the final Permit (Part V.H., Used Oil - PCB Testing).

a. Petitioner states that PCB testing will have negative impacts on transfer facilities in rural areas and transportation in California. Petitioner states examples of the adverse effects on used oil transfer facilities are described in its brief filed in the permit appeal of the American Oil Company (AOC) facility. Petitioner disagrees with a DTSC statement made in the "Final Decision on Appeal from Facility Permitting Decision, HWCA 06/07-PO01, October 19, 2007" (AOC Order) stating that "based on information available to the Department, PCB testing will not have a negative statewide impact..." Petitioner requests that DTSC specify the information it has relied upon in reaching this conclusion.

b. Petitioner states that testing for PCBs will have negative impacts on communities near used oil recycling facilities. Petitioner states that testing of individual trucks at a receiving facility would result in increased traffic in the vicinity of the receiving facility. Petitioner also questions the statements made in the AOC Order stating that the PCB condition will not cause increased truck traffic in the vicinity of the receiving facilities.

1 c. Petitioner states that the BTI Permit condition is an underground
2 regulation. Petitioner states that the PCB testing requirement is a standard of
3 general application because it is being required of all used oil transfer facilities
4 and has not been adopted pursuant to the Administrative Procedure Act (APA).
5 Petitioner also questions the conclusions reached in the AOC Order in this
6 regard.

7 d. Petitioner states that PCB testing is not necessary because it is
8 performed at in-state used oil recycling facilities. If in-state receiving facilities
9 have been accepting used oil with high concentrations of PCBs, then DTSC
10 should use that information to support a rulemaking.

11 e. Petitioner states the fact that the American Oil Company facility did
12 not object to this provision does not make it necessary or appropriate. Petitioner
13 states that the American Oil Company facility does not have enough experience
14 in complying with used oil regulations.

15 **Department's Response:** In its petition for review dated April 7, 2008,
16 Petitioner explains that it previously challenged PCB testing requirements for
17 used oil in the context of the permit for the American Oil Company facility.
18 Petitioner's petition for review repeatedly refers to arguments it presented in the
19 American Oil Company permit appeal. The Department fully considered these
20 arguments in the American Oil Company permit appeal and determined that they
21 should be denied (in the AOC Order). The AOC matter is a final decision.
22 Therefore, this Order will not respond to statements made by Petitioner
23 questioning the adequacy of data or information supporting the conclusions
24 contained in the AOC Order. Furthermore, the BTI Facility is different from
25 the AOC facility in many respects including but not limited to its location and
26 scope of operations. Petitioner's generic arguments about adverse impacts
27 without specific applicability to BTI are not relevant. As permits are facility
28 specific, petitions should present facts and information directly applicable to

1 the facility in question. Thus this Order will not address comments or portions
2 of comments or arguments that are not applicable to the BTI Permit.

3 a. Petitioner argues that the PCB testing requirements will have a
4 serious effect on used oil transfer facilities in rural areas of California.
5 Petitioner's argument is not supported by facts in the record, nor has any new
6 information been provided that wasn't considered in the American Oil Company
7 permit appeal. Additionally, this argument does not apply to the BTI Facility
8 because it is located in an urban area (compared to rural area) and has multiple
9 tanks (compared to a single tank) for storage of used oil. In sum, Petitioner's
10 concern is not applicable to the BTI Facility.

11 b. Petitioner's argument that testing used oil for PCBs will have
12 negative impacts on communities near used oil recycling facilities is not
13 supported by facts. Petitioner speculates that used oil from rural transfer
14 facilities will be taken to urban recycling facilities as a result of the PCB testing
15 condition, leading to a perceived congestion problem at those facilities.
16 However, as discussed previously, the BTI Facility is located in an urban area
17 and does not fit within the concern identified by Petitioner. The PRT's Response
18 to Comments for the BTI final Permit also noted that two other transfer facilities
19 test for PCBs and the concerns raised by Petitioner have not occurred.

20 The PRT also indicated in its Response to Comments that proper
21 pre-acceptance arrangement and scheduling with receiving facilities should:
22 1) reduce idling emissions or wait time; 2) reduce the number of shipments of
23 used oil that are rejected at treatment facilities; and 3) reduce inadvertent
24 mixtures of used oil with used oil containing PCBs. The PRT further asserted
25 that PCB testing acts to protect environmental justice communities from
26 exposure to PCBs, which furthers the Department's mission of protecting human
27 health and the environment.

1 To the extent that Petitioner bases this argument on alleged
2 violation of CEQA requirements, such arguments cannot be considered in this
3 forum because California Public Resources Code 21167 provides a separate,
4 exclusive remedy for adjudicating such allegations.

5 The Department finds that Petitioner's argument is not supported
6 by facts in this case. The PRT's basis for the PCB testing condition as explained
7 in the Response to Comments is reasonable and protects the public from
8 commingling of PCB waste with used oil.

9 c. Petitioner argues that the Permit condition regarding PCB testing is
10 an underground regulation. The PRT, in Attachment 2 of their Response to
11 Comments for the BTI Draft Permit, included the following response taken from
12 the American Oil Company, Final Decision on Appeal from Facility Permitting
13 Decision, HWCA 06/07-PO01, dated October 19, 2007:

14 D/K contends that the permit condition requiring PCB testing is a
15 change in regulatory policy and that the March 15, 2007
16 memorandum is an underground regulation that must be formally
17 adopted pursuant to the Administrative Procedures Act (APA). D/K
is mistaken as to both contentions.

18 First, the June 15, 2007 memorandum from Deputy Director
19 Watson Gin to Ray Leclerc, Permit Renewal Team Leader provides
20 direction in determining permit conditions for used oil transfer
21 facilities. The memorandum suggests what permit conditions
22 "should" be considered in establishing the appropriate permit
23 conditions at used oil transfer facilities. The attached chart
24 underscores this interpretation in that it lists facilities that the team
25 is not working on that have the PCB testing permit condition,
26 including one that "may" require a modification to add the
27 requirement, and eighteen permits that the team is working on.
28 The memorandum in no way pre-determines or decides how permit
conditions will be established for the affected facilities. The
memorandum is merely intended to provide direction and
consideration of the requirement for the permit renewal team and is
not a change in DTSC regulatory policy.

Moreover, the requirement to include PCB testing as a permit
condition is, as noted above, intended to ensure that a receiving
facility accepts legally authorized used oil. It is well settled that

1 DTSC has the authority to impose permit conditions on each
2 hazardous waste facility specifying the types of hazardous waste
3 that may be accepted for transfer, storage treatment or disposal.
4 (Health & Saf. Code, §25200(a).) In addition, DTSC may impose
5 any other conditions on a hazardous waste facilities permit that are
6 consistent with the intent of the Hazardous Waste Control Law
7 (HWCL). (Ibid)

8 In this case, DTSC is imposing a permit condition that ensures the
9 facility and the receiving facility accepts used oil and not another
10 type of hazardous waste contaminated with PCBs. Such a
11 requirement is consistent with the intent of the HWCL that transfer
12 facilities and receiving facilities accept, transfer and dispose of the
13 type of hazardous waste allowable under the permit.

14 The requirement is a reasonable means of protecting public health
15 and the environment. The requirement to test for PCBs in the AOC
16 permit is not a rule or standard of general application. It is a
17 requirement to be considered in a specific case, as suggested by
18 the use of the words "should" in the March, 2007 memorandum.

19 AOC was given notice and an opportunity to be heard in
20 establishing the permit condition. AOC had no objection to the
21 requirement, so it cannot be deemed as an attempt on DTSC's part
22 to improperly impose a permit condition without due process of the
23 law. Instead, the PCB testing requirement was considered and
24 determined to be necessary to include as a permit condition for
25 AOC.

26 The Department agrees with the aforementioned Response to
27 Comments and finds that the PCB testing provision for used oil in Part V.H.,
28 Used Oil - PCB Testing, of the BTI Permit, is not required to be adopted by
regulation. This condition is authorized by existing statutes and regulation.
Health and Safety Code section 25200(a) requires the Department to impose
conditions on each hazardous waste facility's permit that specify the types of
hazardous wastes that may be accepted for transfer, storage, treatment or
disposal. The PCB testing condition falls within this requirement as it defines the
hazardous waste that may be accepted by BTI as used oil. Additionally, the
Department may impose any other condition that is determined necessary by the

1 Department to protect human health and the environment. (See Health & Saf.
2 Code § 25200, subds. (a) and (d)(2); Cal. Code Regs., tit. 22, § 66270.32, subds.
3 (b)(1) and (2).) This condition prevents the mixing of PCB waste with used oil
4 which, in turn, promotes the recycling of used oil.

5 Permitted facilities are also required to have a waste analysis plan
6 to ensure that the waste actually received by the facility matches the generator's
7 description of the waste on the manifest. (Cal. Code Regs., tit. 22, §§ 66270.14,
8 subd. (b)(3), 66264.13.) The PCB testing condition ensures that used oil
9 received and managed by BTI meets the legal definition of used oil and does not
10 contain PCBs in excess of the legal limit.

11 The courts have determined that the APA's procedural
12 requirements do not apply where the agency's actions apply the plain language
13 of a statute. It is only where policies or procedures depart from or embellish upon
14 express statutory authorization and language that the agency will need to
15 promulgate regulations. (*Engelmann v. State Bd. Of Education* (1991) 2
16 Cal.App.4th 47,62; *Morning Star Company v. State Bd. Of Equalization* (2006) 38
17 Cal.4th 324, 336.) The APA procedural requirements do not apply to the permit
18 condition regarding PCB testing in this Permit because the Department has
19 express statutory authorization to impose such a condition. It should also be
20 noted that the imposition of this condition in the Permit is subject to the right of
21 stakeholders to provide comment on the condition during the permit process, and
22 is subject to appeal rights following the permit decision.

23 d. Petitioner argues that PCB testing is not necessary because it is
24 performed at in-state recycling facilities. Petitioner does not explain how testing
25 for PCBs at in-state recycling facilities ensures that PCBs will not be present in
26 waste received and managed at the BTI Facility. Paraphrasing from
27 Attachment 2 of PRT's Response to Comments for the BTI Draft Permit:

28 (DTSC) has the authority to impose permit conditions on each
hazardous waste facility specifying the types of hazardous waste

1 that may be accepted for transfer, storage treatment or disposal.
2 (Health & Saf. Code, §25200(a).) In addition, DTSC may impose
3 any other conditions on a hazardous waste facilities permit that are
consistent with the intent of the HWCL. (Ibid)

4 DTSC has the statutory authority and mandate to impose permit
5 conditions to ensure that transfer facilities receive only the
6 hazardous waste authorized for that facility. DTSC is imposing a
7 permit condition that ensures the facility and the receiving facility
8 accepts used oil and not another type of hazardous waste
9 contaminated with PCBs. The permit condition is a reasonable
10 means of protecting public health and the environment. Such a
requirement is consistent with the intent of the HWCL that transfer
facilities and receiving facilities accept, transfer and dispose of the
type of hazardous waste allowable under their permit.

11 The Department agrees that the PCB testing condition is
12 reasonable, and finds that it will ensure that the BTI Facility receives the waste it
13 has been authorized to receive, namely used oil, and not another type of
14 hazardous waste contaminated with PCBs.

15 e. Petitioner contends that the fact that American Oil Company agreed
16 to the condition doesn't mean it is necessary or appropriate. It is not clear what
17 relevance American Oil Company's actions have with regard to the BTI Permit.
18 Petitioner may have instead intended to reference BTI in their argument, but this
19 is not clear. Without regards to whom Petitioner meant to refer to, the
20 Department's decision in this Order is based on the record that has been
21 presented. As discussed in this decision, the Department finds that the PCB
22 testing condition in the BTI Permit is reasonable, is authorized by express
23 statutory and regulatory provisions, and is protective of public health and the
24 environment.

25 For all of these reasons, the Department finds that Petitioner has failed to
26 demonstrate that this Permit condition is based upon a finding of fact or
27 conclusion of law which is clearly erroneous or an exercise of discretion or an
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1 important policy consideration which the Department should, in its discretion,
2 review. For these reasons, the Department denies the petition for review.

3 **VI. ORDER**

4 For the reasons set forth above, the Permit Appeals Officer has
5 determined that Petitioner has failed to meet the burden to establish that a review
6 of the PCB testing condition, Part V.H., should be granted pursuant to the criteria
7 for review set forth in California Code of Regulations, title 22, section
8 66271.18(a). Therefore, the request for review is denied.

9 This denial of review constitutes the Department's final permit decision.
10 The decision shall be effective on the date of mailing of this Order denying
11 review. The stay of the BTI Permit is hereby vacated and the Permit shall be
12 effective as of this date.

13 DATED: October 22, 2008
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16 **//original signed by//**

17 Mohinder S. Sandhu, P.E. _____
18 Permit Appeals Officer
19 Department of Toxic Substances Control
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